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No. 06-856

In the Supreme Court of the United States

JAMES LARUE, PETITIONER

v.

DEWOLFF, BOBERG & ASSOCIATES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

PAUL D. CLEMENT
Solicitor General
Counsel of Record

EDWIN S. KNEEDLER
Deputy Solicitor General

MATTHEW D. ROBERTS
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

JONATHAN L. SNARE
Acting Solicitor of Labor

TIMOTHY D. HAUSER
Associate Solicitor

ELIZABETH HOPKINS
Acting Counsel for Appellate and Special Litigation
Department of Labor
Washington, D.C. 20210

QUESTIONS PRESENTED

1. Whether Section 502(a)(2) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1132(a)(2), authorizes a participant in a defined contribution pension plan to sue to recover losses to the plan caused by a fiduciary breach when the losses affected only the participant's individual plan account.

2. Whether an action by a plan participant against a fiduciary to recover losses caused by a fiduciary breach seeks "equitable relief" within the meaning of ERISA Section 502(a)(3), 29 U.S.C. 1132(a)(3).

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

1. Congress enacted the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, "to protect * * * the interests of participants in employee benefit plans * * * by establishing standards of conduct, responsibility, and obligation for fiduciaries of [those] plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. 1001(b). To that end, ERISA Section 502(a), 29 U.S.C. 1132(a) (2000 & Supp. IV 2004), provides "six carefully integrated civil enforcement provisions." *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 146 (1985). As relevant here, Section 502(a)(2) provides that "[a] civil action may be brought" by a plan "participant"—as well as a beneficiary, plan fiduciary, or the Secretary of Labor—to obtain "appropriate relief" under ERISA Section 409 (29 U.S.C. 1109). 29 U.S.C. 1132(a)(2). Section 409(a), in turn, provides that "[a]ny person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by [Title I of ERISA] shall be personally liable to make good to such plan any losses to the plan resulting from each such breach * * * and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary." 29 U.S.C. 1109(a). The other enforcement provision at issue in this case, Section 502(a)(3), allows a participant, beneficiary, or fiduciary to sue "to enjoin any act or practice which violates" ERISA or the terms of the plan or "to obtain other appropriate equitable relief (i) to re-

dress such violations or (ii) to enforce any provisions of [Title I of ERISA] or the terms of the plan." 29 U.S.C. 1132(a)(3).

2. Petitioner James LaRue is a participant in an ERISA-covered 401(k) pension plan sponsored by his employer, respondent DeWolff, Boberg & Associates, Inc. Pet. App. 2a; see 26 U.S.C. 401(k). Respondent administers the plan and, in fulfilling that role, acts as an ERISA fiduciary. *Ibid.* The plan is a "defined contribution" or "individual account plan." 29 U.S.C. 1002(34). In a defined contribution plan, the employer or employees make a fixed contribution to the plan, "which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account." 29 U.S.C. 1002(34); see *Nachman Corp.* v *PBGC*, 446 U.S. 359, 364 n.5 (1980). Although each participant has an individual account, all of the assets are held in trust by plan trustees who retain legal title to and authority over the assets. See 29 U.S.C. 1103(a); see Rev. Rul. 89-52, 1989-1 C.B. 110.

Under the plan, participants are permitted to choose from a number of investment options and to direct respondent, as plan administrator, to invest the amounts allocated to their individual accounts in specified percentages among those options. Pet. App. 2a. Petitioner claimed that, in 2001 and 2002, respondent failed to make certain investments that petitioner directed with respect to his account, causing a loss of approximately $150,000 to his "interest in the plan." Br. in Opp. App. 2a-4a. Claiming that respondent had breached its fiduciary obligations by failing to carry out his instructions, petitioner sought reimbursement of the resulting losses. *Id.* at 3a-4a; see *id.* at 50a (asking court to order respondent "to reimburse to the plan amounts necessary so that [petitioner's] interest in the plan is what it should have been, but for the breach of

fiduciary duty"). In his complaint, petitioner relied on ERISA Section 502(a)(3), 29 U.S.C. 1132(a)(3), which authorizes "appropriate equitable relief." Br. in Opp. App. 3a-4a. Respondents, arguing that the monetary remedy sought by petitioner is unavailable under ERISA, moved for judgment on the pleadings under Federal Rule of Civil Procedure 12(c). The district court agreed and granted judgment for respondents. Pet. App. 15a-21a.

3. In the court of appeals, petitioner argued that respondents are liable for the $150,000 loss to the plan under ERISA Sections 502(a)(2) and 409(a), which together make a fiduciary liable for "losses to the plan" resulting from breaches of fiduciary duty. Petitioner also argued, as he had in the district court, that he was entitled to recover the losses to his account as appropriate equitable relief under Section 502(a)(3). The Fourth Circuit rejected both bases for recovery and affirmed the district court's judgment. Pet. App. 1a-14a.

The court of appeals held that, "[e]ven if the [Section 502(a)(2)] argument were not * * * waived," petitioner could not state a claim under that provision because "[r]ecovery under [Section 502(a)(2)] must 'inure[] to the benefit of the plan *as a whole*,' not to particular persons with rights under the plan." Pet. App. 5a (quoting *Russell*, 473 U.S. at 140) (emphasis added by court of appeals). The court concluded that petitioner's suit would not benefit the plan for three reasons: (1) he sought "recovery to be paid into his plan account, an instrument that exists specifically for his benefit;" (2) "[t]he measure of that recovery is a loss suffered by him alone;" and (3) "that loss itself allegedly arose as the result of [respondent's] failure to follow [petitioner's] own particular instructions, thereby breaching a duty owed solely to him." *Id.* at 6a. The court stated that petitioner's suit was "different from a [Section 502(a)(2)] action in which an individual plaintiff sues on behalf of the plan itself or on behalf of a class of similarly

situated participants," because, in that other kind of case, the remedy "does not *solely* benefit the individual participants." *Ibid.* (citation omitted).

The court of appeals also held that petitioner could not state a claim under Section 502(a)(3). Pet. App. 7a-13a. In the court's view, petitioner's suit sought compensatory damages, which the court concluded were not available under Section 502(a)(3). *Id.* at 9a-10a. The court rejected petitioner's argument that he was seeking equitable relief because he was suing a fiduciary to recover losses caused by a fiduciary breach—relief that was historically available only in equity. *Id.* at 10a-13a. The court concluded that petitioner's argument was foreclosed by *Mertens* v. *Hewitt Associates*, 508 U.S. 248 (1993), and *Great-West Life & Annuity Insurance Co.* v. *Knudson*, 534 U.S. 204 (2002). Pet. App. 11a-13a.

4. Petitioner sought panel and en banc rehearing on the Section 502(a)(2) issue, and the Secretary of Labor filed an amicus brief in support of his petition. In an opinion denying the petition, the court reiterated its conclusion that petitioner could not proceed under Section 502(a)(2). Pet. App. 22a-29a.

DISCUSSION

This case presents this Court with the opportunity to resolve two important and recurring issues about the scope of the civil enforcement provisions of the ERISA. The Fourth Circuit held that ERISA Section 502(a)(2), 29 U.S.C. 1132(a)(2), does not permit a participant in a defined contribution pension plan to sue based on losses to the plan caused by a fiduciary breach when the losses affected only the participant's individual plan account. The court also held that such a participant cannot sue under Section 502(a)(3), 29 U.S.C. 1132(a)(3), to restore assets lost as a result of the fiduciary breach because such a suit does not seek "equitable relief" within the meaning of that provision. The court decided both issues incorrectly, and both issues have divided the courts of

appeals. Moreover, because of ERISA's expansive preemption provision, which broadly supersedes all state laws insofar as they relate to any ERISA plan, 29 U.S.C. 1144, the Fourth Circuit's decision threatens to leave many plan participants without any effective redress for breaches of ERISA's fiduciary duties. This Court's review is therefore warranted.

A. The Question About The Scope Of Section 502(a)(2) Warrants This Court's Review

1. The court of appeals erred in holding that Section 502(a)(2) does not authorize petitioner to sue to recover losses to his defined contribution plan account that were caused by respondent's alleged breach of fiduciary duty. Section 502(a)(2) authorizes a "participant" to bring suit for appropriate relief under ERISA Section 409. That section, in turn, imposes personal liability on any plan fiduciary for "any losses to the plan" resulting from "each * * * breach" of "any of the responsibilities, obligations, or duties imposed" by Title I of ERISA. 29 U.S.C. 1109(a). Petitioner's suit falls squarely within the text of those provisions. Petitioner has alleged that respondent, acting as a plan fiduciary, failed to invest assets in his plan account in accordance with his directions and that, as a result of that breach of fiduciary duty, the plan and his account within the plan held approximately $150,000 less than they would otherwise have held. Pet. App. 2a-3a; Br. in Opp. App. 3a-4a. Petitioner seeks an order requiring respondent "to reimburse to the plan amounts necessary so that [petitioner]'s interest in the plan is what it should have been, but for the breach of fiduciary duty." *Id.* at 50a. That is precisely what Sections 502(a)(2) and 409 authorize—a suit by a "participant" to recover for the plan "losses to the plan" resulting from a breach of fiduciary duty. 29 U.S.C. 1132(a)(2), 1109.

The court of appeals concluded (Pet. App. 5a-6a) that petitioner is not entitled to sue under Section 502(a)(2) only because the court misinterpreted *Massachusetts Mutual Life*

Insurance Co. v. *Russell*, 473 U.S. 134 (1985). *Russell* provides no barrier to a suit like petitioner's, in which a participant in a defined contribution plan seeks to recover *for the plan* losses caused by a fiduciary breach and manifested in the participant's plan account. The plaintiff in *Russell* was not seeking a recovery *payable to the plan* of losses to the plan. Instead, she sought compensatory and punitive damages payable *directly to her* as compensation for a delay in her receipt of disability benefit payments. *Id.* at 137-138. In holding that her suit was not authorized by Section 502(a)(2), the Court distinguished the relief that she sought—damages payable directly to her for pain and suffering—from relief payable to the plan to recoup "losses to the plan" arising from mismanagement of plan assets. 473 U.S. at 140-141 & n.8. The Court recognized that a recovery for the plan of losses arising from mismanagement of plan assets is available under Section 502(a)(2), see 473 U.S. at 140-141 & n.8, 142, 144, and it observed that such a recovery "inures to the benefit of the plan as a whole," *id.* at 140.

Petitioner is seeking the kind of recovery that *Russell* indicates is available under Section 502(a)(2), even though the ultimate effect of relief to the plan would be to increase the balance in petitioner's plan account. Petitioner seeks a payment to the plan equal to the "losses to the plan" that resulted from respondent's mismanagement of plan assets attributable to petitioner's account. That recovery will "benefit * * * the plan as a whole" in the sense that it will directly increase the overall amount of assets held by the plan. Indeed, a portion of the recovered assets, like any other assets of the plan, may be used by the plan to defray the operating costs of the entire plan. See Employee Benefits Sec. Admin., U.S. Dep't of Labor, *Field Assistance Bulletin 2003-3* (May 19, 2003) <http://www.dol.gov/ebsa/regs/fab_2003-3.html> (discussing appropriate methods of allocating such expenses).

The court of appeals incorrectly reasoned that petitioner is not seeking recovery of losses to the plan on the grounds that the losses were suffered only by petitioner's plan account, and the recovery would be allocated to that account. See Pet. App. 6a. That reasoning misunderstands the nature of a defined contribution plan. By statutory design, the assets of a defined contribution plan are allocated, as a bookkeeping matter, to individual accounts within the plan for the beneficial interest of the participants (whose benefits are dependent on the amounts so allocated). 29 U.S.C. 1002(34). But the assets are nevertheless held in a unitary trust and legally owned by one or more trustees. See 29 U.S.C. 1103(a); 26 U.S.C. 401(a) (2000 & Supp. IV 2004); Rev. Rul. 89-52, 1989-1 C.B. 110. Thus, the necessary allocation of any recovery of plan losses to one or more individual accounts within the plan does not change their nature as "losses to the plan." Because the fiduciary breaches alleged here resulted in a reduction of the assets held by the plan's trust, and because the plan is legally entitled to recover the lost assets and to hold them to support the payment of benefits and plan expenses, the court of appeals erred in concluding that the recovery would "*solely* benefit" petitioner, see Pet. App. 6a (citation omitted).

The court of appeals also erred in concluding that petitioner's suit is not authorized by Section 502(a)(2) on the theory that the losses arose from an alleged breach of a "duty owed solely to him." Pet. App. 6a. Sections 502(a)(2) and 409 provide a remedy for the breach of "*any* of the responsibilities, obligations, or duties imposed upon fiduciaries" by ERISA, not just those breaches that affect all or a majority of plan participants. 29 U.S.C. 1109(a) (emphasis added). Moreover, ERISA's fiduciary duties protect all plan assets and all plan participants. See 29 U.S.C. 1104(a). Thus, the duty to follow a participant's investment instructions was owed to all plan participants, not just petitioner.

2. This Court's review is warranted because the court of appeals' holding on the Section 502(a)(2) issue conflicts with the decision of every other court of appeals that has addressed that issue. Those courts have all held that Section 502(a)(2) authorizes suits by participants in defined contribution plans to recover losses caused by fiduciary breaches notwithstanding that the recovery will ultimately be allocated to the plan accounts of a limited number of participants.

The earliest decision is *Kuper* v. *Iovenko*, 66 F.3d 1447 (1995), in which the Sixth Circuit held that a subset of plan participants could sue under Sections 502(a)(2) and 409 to recover losses caused by a fiduciary breach that affected only their individual plan accounts. *Id.* at 1452-1453. The court reasoned that the "argument that a breach must harm the entire plan to give rise to liability under [Section 409] would insulate fiduciaries who breach their duty so long as the breach does not harm all of a plan's participants." *Id.* at 1453.

The Seventh Circuit in *Steinman* v. *Hicks*, 352 F.3d 1101 (2003), likewise held that a subset of participants in an individual account plan may sue plan fiduciaries under Section 502(a)(2). The district court had ruled that the plaintiffs could not maintain their action under Section 502(a)(2) because they sought to "recover their individual losses * * * rather than suing on behalf of the * * * [p]lan." *Steinman* v. *Hicks*, 252 F. Supp. 2d 746, 756 (C.D. Ill. 2003). Although the Seventh Circuit affirmed on other grounds, it rejected that analysis. It held that the suit "clearly" arose under Section 502(a)(2) "because the plaintiffs are asking that the trustees be ordered to make good the losses to the plan caused by their having breached fiduciary obligations." 352 F.3d at 1102.

The Third Circuit agreed in *In re Schering-Plough Corp. ERISA Litigation*, 420 F.3d 231 (2005). The court held that the plaintiff could "seek money damages on behalf of the fund, notwithstanding the fact the alleged fiduciary violations af-

fected only a subset of the saving plan's participants." *Id.* at 232. The court reasoned that a "fiduciary's liability is not limited to plan 'losses that will ultimately redound to the benefit of all participants.'" *Id.* at 235 (citation omitted).

Similarly, the Fifth Circuit, sitting en banc, vacated a panel decision that had held that a subset of the participants in a 401(k) plan, who comprised less than one percent of all the plan participants, could not sue under Section 502(a)(2). The panel had reasoned that the plaintiffs sought to recover for breaches that were not, in the panel's view, "targeted [at] the plan as a whole." *Milofsky* v. *American Airlines, Inc.*, 404 F.3d 338, 343-344 & n.16 (5th Cir. 2005), vacated on reh'g en banc, 442 F.3d 311 (5th Cir. 2006). In a per curiam decision, the en banc court held that the claims should not have been dismissed. 442 F.3d at 313.

Contrary to the reasoning of the Fourth Circuit in this case (Pet. App. 6a, 26a-27a), those decisions are not distinguishable on the ground that they involved suits by a class or subset of plan participants rather than a single participant. Although the number of affected participants differs, the nature of the relief—the payment of money *to the plan*—is the same whether the recovery is allocated to the account of one participant, a number of participants, or every participant in the plan. The argument rejected by the other courts of appeals is, in substance, little different from the argument accepted by the Fourth Circuit here—that a participant may not sue under Section 502(a)(2) to recover losses caused by fiduciary breaches where the recovery will be allocated to his individual account. See, *e.g.*, *Schering-Plough*, 420 F.3d at 235 ("the fact that the assets at issue were held for the ultimate benefit of Plaintiffs does not alter the fact that they were held by the Plan"). In those cases, as here, any recovery would be allocated among only a fraction of the participants' accounts within the plan. Indeed, in *Milofsky*, in which the suit was

brought by only 218 participants in a plan with more than 85,000 members, the impact of the recovery on participant accounts was smaller on a percentage basis than in this case. Petitioner's account represents .33% of all plan accounts, as distinguished from the *Milofsky* plaintiffs' stake in .26% of plan accounts. This Court's review is warranted to resolve the conflict among the courts of appeals.[1]

3. This Court's review is also warranted because the question whether Section 502(a)(2) authorizes an individual participant in a defined contribution plan to sue to recover losses attributable to his plan account is an important one. The court of appeals' holding that such suits are not authorized imposes a significant and unwarranted limitation on the ability of participants in defined contribution plans to obtain redress for a violation of fiduciary duties. That limitation could skew decisions about the forms of plan benefits offered and selected, and would have a substantial impact on pension plan participants because defined contribution plans are the predominant type of pension plan in the United States and hold approximately $3.2 trillion in assets. See Board of Governors

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[1] The Fourth Circuit erred in asserting (Pet. App. 27a-28a) that a holding that petitioner may sue under Section 502(a)(2) would conflict with appellate decisions recognizing that a claim for individual loss is not cognizable under Section 502(a)(2). Almost all of the cases cited by the Fourth Circuit are cases in which plan participants or other individuals sought compensation *for themselves* rather than restoration of losses to the plan. *Smith* v. *Sydnor*, 184 F.3d 356 (4th Cir. 1999), cert. denied, 528 U.S. 1116 (2000), did involve a claim for restoration of losses *to the plan*, but the court of appeals permitted the suit to go forward. *Id.* at 363. The only other case that arguably involved a claim for losses to the plan is *Matassarin* v. *Lynch*, 174 F.3d 549 (5th Cir. 1999), cert. denied, 528 U.S. 1116 (2000). To the extent *Matassarin* suggests that Section 502(a)(2) does not authorize a suit to recover losses to a defined contribution plan that affected a subset of plan participants, that decision has been superseded by the Fifth Circuit's en banc ruling in *Milofsky*.

of the Fed. Reserve Sys., *Flow of Funds Accounts of the United States: Flows and Outstandings, Fourth Quarter 2006*, Statistical Release Z.1, at 113 (Mar. 8, 2007) <http://www.federalreserve.gov/releases/Z1/current/Z1.pdf>.

At a minimum, the court of appeals' decision will immunize fiduciaries operating in the Fourth Circuit from liability for breaches of fiduciary duty, no matter how egregious, so long as the breaches primarily involve the account of a single participant in a defined contribution plan. And the decision will leave plan fiduciaries, participants, and even the Secretary of Labor without the ability to recover losses caused by those breaches. Currently, the Secretary brings many cases each year against plan fiduciaries who fail to forward employee contributions to their plans. See Employee Benefits Sec. Admin., U.S. Dep't of Labor, *Fact Sheet: Retirement Security Initiatives* (Jan. 2007) <http://www.dol.gov/ebsa/newsroom/fsecp.html>. In the Fourth Circuit, the Secretary may now be precluded from recovering losses caused by a fiduciary's deliberate diversion of contributions to a single participant's plan account, even though the plan clearly received fewer assets than its entitlement. Moreover, as petitioner notes (Pet'r Reply Br. 7), approximately 91% of all private retirement plans have fewer than 100 participants, and fiduciary breaches with respect to those plans will, therefore, affect correspondingly smaller numbers of participants. As a result, the impact of the decision below is likely to be significant even if it is given its narrowest possible reading as applying only to suits brought for the primary benefit of a single participant's account.

It is unlikely, however, that the decision will in fact be limited to cases that involve losses to a single participant's account. As discussed above, there is no statutory or logical basis on which to draw a line between a case involving losses to a single plan account and the many other cases involving

losses to the accounts of more than one, but less than all, of a plan's participants. Indeed, at least one district court has already employed the reasoning on which the court of appeals relied here to dismiss a suit that affected two plan accounts. *Tullis* v. *UMB Bank, N.A.*, 464 F. Supp. 2d 725 (N.D. Ohio 2006). And respondents suggest that relief under Section 502(a)(2) "can only be pursued where the alleged fiduciary breach affects a significant number of participants," Br. in Opp. 8, but offer no guidance on how courts are to determine what constitutes a "significant" number.

Thus, in contrast to the clear text of the statute, which allows a participant to sue to recover "*any* losses to the plan," 29 U.S.C. 1109(a) (emphasis added), the Fourth Circuit's decision establishes an unclear and unworkable standard. That uncertain standard will mire courts in litigation as they seek to draw a line between suits that are impermissible because they involve too few participants and suits that are permissible because the participants "serve as a legitimate proxy for the plan in its entirety." Pet. App. 6a. Moreover, the logic underlying the court of appeals' decision may ultimately result in a rule that Section 502(a)(2) suits are permissible for a defined contribution plan only if all or virtually all of the plan's participants have been affected by the breach. That will seldom be the case for 401(k) plans, which comprise the majority of all ERISA-covered pension plans, because those plans generally offer an array of investment options, and different participants elect different options. See Employee Benefits Sec. Admin., U.S. Dep't of Labor, *Private Pension Plan Bulletin* 2, 44 (Mar. 2007) <http://www.dol.gov/ebsa/PDF/2004pensionplanbulletin.pdf>. Certainly it makes no sense to adopt a rule that would make the consequence of expanded employee choice a reduction in employees' ability to redress violations of fiduciary duties. Because the rule adopted by the court of appeals is likely to constrict signifi-

cantly the available relief for breaches of fiduciary duties to ERISA plans, this Court's review of the Section 502(a)(2) issue is warranted.[2]

B. The Question About The Scope Of Section 502(a)(3) Also Warrants This Court's Review

The Court should also grant review of the second issue presented by the petition for a writ of certiorari—whether a suit against a fiduciary to recover losses caused by a breach of fiduciary duty seeks "equitable relief" and is therefore authorized by Section 502(a)(3) of ERISA.

1. The court of appeals erred in holding that Section 502(a)(3) does not permit a suit against a fiduciary to recover losses caused by a breach of fiduciary duty. Contrary to the conclusion of the court of appeals, such a suit seeks "equitable relief" as authorized by Section 502(a)(3).

In *Mertens* v. *Hewitt Associates*, 508 U.S. 248 (1993), this Court held that the "equitable relief" authorized by Section 502(a)(3) is relief that was "typically available in equity." *Id.*

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[2] This case is an appropriate one in which to address the issue even though the court of appeals suggested that petitioner may have forfeited reliance on Section 502(a)(2) by failing to invoke that specific provision in the district court. See Pet. App. 5a. Despite the court of appeals' statement about "waiver," *ibid.*, the court went on to address and to resolve the Section 502(a)(2) issue. That issue is therefore properly before this Court. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992). Moreover, it is unclear that the court of appeals actually *held* that petitioner had forfeited reliance on Section 502(a)(2). Respondents do not argue that the court did so, but state only that the court "suggest[ed] th[e] claim may have been waived." Br. in Opp. 5. Nor do respondents argue that the court's statement about "waiver" is a reason to deny the petition. See, *e.g.*, *id.* at 1-2 (summarizing reasons to deny the petition and not mentioning forfeiture or waiver). Thus, the court of appeals' passing reference to "waiver" should not dissuade this Court from granting review of the court of appeals' ruling on the Section 502(a)(2) issue.

at 256 (emphasis removed). Applying that standard, the Court concluded that Section 502(a)(3) does not permit a suit against a *non*-fiduciary to recover money damages. See *id.* at 256-263. The Court provided further elaboration on the scope of Section 502(a)(3) in *Great-West Life & Annuity Insurance Co.* v. *Knudson*, 534 U.S. 204 (2002). In *Great-West*, the Court held that Section 502(a)(3) does not authorize an ERISA plan to sue to enforce a plan provision requiring beneficiaries to reimburse the plan for medical benefits for which they received a recovery from third parties. See *id.* at 206, 221. In reaching that holding, the Court rejected the plan's argument that restitution is necessarily "equitable relief." See *id.* at 212-218. The Court explained that, in the days of the divided bench, restitution was available at both law and equity, and, therefore, "whether it is legal or equitable depends on 'the basis for [the plaintiff's] claim' and the nature of the underlying remedies sought." *Id.* at 213 (citation omitted; brackets in original). Most recently, in *Sereboff* v. *Mid Atlantic Medical Services, Inc.*, 126 S. Ct. 1869 (2006), the Court held that a suit to enforce a plan reimbursement provision could be brought under Section 502(a)(3), because the plan beneficiary had agreed to preserve a portion of the funds received from the third party in a segregated investment account until resolution of the plan's claim against the funds. The Court concluded that both the plan's claim and the relief it sought would have been considered equitable in the days of the divided bench because the plan sought to enforce "an equitable lien established by agreement." *Id.* at 1877; see *id.* at 1873-1877.

Here, as in *Sereboff*, both petitioner's claim, breach of fiduciary duty, and the relief he seeks, surcharge of the trustee for the losses resulting from the breach, were typically—indeed, exclusively—equitable in the days of the divided bench. Historically, equity exercised exclusive jurisdic-

tion over claims by a trust beneficiary against a trustee for breach of trust, subject to limited exceptions not relevant here. See Restatement (Second) of Trusts (Second Restatement) § 197, at 433 (1959); *id.* § 198, at 434 (exceptions); John N. Pomeroy, *A Treatise on Equity Jurisprudence* § 151, at 206 (5th ed. 1941); *Duvall* v. *Craig*, 17 U.S. (2 Wheat.) 45, 56 (1817) ("A trustee, merely as such, is, in general, suable only in equity."); *Manhattan Bank* v. *Walker*, 130 U.S. 267, 271 (1889); *Clews* v. *Jamieson*, 182 U.S. 461, 479 (1901).

In an action for breach of trust, equity provided a variety of remedies, including compelling the trustee to perform his duties, enjoining the trustee from committing a breach of trust, and "compel[ling] the trustee to redress a breach." Second Restatement § 199, at 437; see 3 Austin W. Scott & William F. Fratcher, *The Law of Trusts* (Scott) § 199, at 203-207 (4th ed. 1988). One of the remedies, available when the breach had caused a loss to the trust, was a "surcharge" on the trustee in "the amount required to restore the values of the trust estate and trust distributions to what they would have been if the trust had been properly administered." Restatement (Third) of Trusts § 205 & cmt. a, at 223 (1992); see 3 Scott § 205, at 238-240 (describing circumstances under which trustee was subject to "surcharge"); *Manhattan Bank*, 130 U.S. at 271 ("The suit is plainly one of equitable cognizance, the bill being filed to charge the defendant, as a trustee, for a breach of trust.").[3] Thus, a suit against a fidu-

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[3] See, *e.g.*, *United States* v. *Mason*, 412 U.S. 391, 398 (1973) (holding that United States was not subject to "surcharge" for paying state tax on property held in trust for Indians because it acted with requisite care (quoting 2 Scott § 176, at 1419 (3d ed. 1967))); *Mosser* v. *Darrow*, 341 U.S. 267, 270, 272, 273 (1951) (holding that district court properly imposed a "surcharge" on bankruptcy trustee); *Princess Lida* v. *Thompson*, 305 U.S. 456, 458, 464 (1939) (describing authority of Pennsylvania state court, in a "suit in equity," "to surcharge [a trustee] with losses incurred").

ciary to recover losses caused by a breach of fiduciary duty seeks "equitable relief" under Section 502(a)(3).

Contrary to the court of appeals' conclusion (Pet. App. 10a-13a), neither *Mertens* nor *Great-West* indicates that Section 502(a)(3) does not authorize a suit against a fiduciary to surcharge the fiduciary for losses caused by a breach of fiduciary duty. *Mertens* involved a suit not against fiduciaries, but against *non*-fiduciaries. See 508 U.S. at 253-254, 262. Moreover, the plaintiffs in *Mertens* "d[id] not * * * seek a remedy traditionally viewed as 'equitable.'" *Id.* at 255. Rather, they sought "all damages according to proof" and "punitive damages." J.A. at 17, *Mertens*, *supra* (No. 91-1671). Likewise, *Great-West* involved neither a suit against a fiduciary nor a suit to obtain the equitable remedy of surcharge. Instead, *Great-West* involved a suit by a plan against a participant, which the plan characterized as a suit for restitution but the Court concluded was a suit for money damages under a contract. See 534 U.S. at 212-218.

2. The court of appeals' holding on the scope of Section 502(a)(3) warrants this Court's review because it deepens an existing conflict among the courts of appeals. The majority of the courts of appeals that have addressed the issue have, like the court below, held that Section 502(a)(3) does not authorize suits against a fiduciary to recover losses caused by a breach of fiduciary duty. See *Coan* v. *Kaufman*, 457 F.3d 250, 262-264 (2d Cir. 2006) (reversing prior holding in *Strom* v. *Goldman, Sachs & Co.*, 202 F.3d 138 (2d Cir. 1999)); *Calhoon* v. *TWA*, 400 F.3d 593, 596-598 (8th Cir. 2005); *Callery* v. *United States Life Ins. Co.*, 392 F.3d 401, 405-409 (10th Cir. 2004), cert. denied, 126 S. Ct. 333 (2005); *Helfrich* v. *PNC Bank., Ky., Inc.*, 267 F.3d 477, 481-482 (6th Cir. 2001), cert. denied, 535 U.S. 928 (2002); see also *Goeres* v. *Charles Schwab & Co.*, No. 05-15282, 2007 WL 495191 (9th Cir. Feb. 14, 2007), petition for cert. pending, No. 06-1521 (filed May 15, 2007). In

contrast, the Seventh Circuit has held that Section 502(a)(3) does authorize such suits because monetary relief, "when sought as a remedy for breach of fiduciary duty[,] * * * is properly regarded as an equitable remedy." *Bowerman* v. *Wal-Mart Stores, Inc.*, 226 F.3d 574, 592 (2000) (citation omitted; brackets in original).[4]

Respondents incorrectly argue that "*Great-West* effectively eliminated any conflict over this issue." Br. in Opp. 12. As discussed above, nothing in *Great-West* is inconsistent with the conclusion that Section 502(a)(3) authorizes suits against a fiduciary to recover losses caused by a breach of fiduciary duty. Moreover, in a decision that post-dates *Great-West*, the Seventh Circuit expressly noted that "ERISA 'as currently written and interpreted, may allo[w] at least some forms of "make-whole" relief against a breaching *fiduciary* in light of the general availability of such relief in equity at the time of the divided bench,'" *McDonald* v. *Household Int'l, Inc.*, 425 F.3d 424, 430 (7th Cir. 2005) (quoting *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 223 (2004) (Ginsburg, J., concurring)), and the court of appeals remanded to allow the plaintiffs to amend their complaint to add ERISA claims.

3. This Court's review of the Section 502(a)(3) issue is also warranted because the issue is of substantial importance. First, the confusion about whether a suit against a fiduciary to recover losses for a breach of duty is equitable relief authorized by Section 502(a)(3) is generating additional confusion in related areas of the law. Until recently, all the courts of

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[4] Although the Seventh Circuit denominated the remedy in that case "restitution," it approved an award of the benefits that the participant would have received but for the breach, which is the type of relief that would have been provided by surcharge. See *Bowerman*, 226 F.3d at 592. Moreover, the court clearly rested its conclusion on the fact that actions and remedies against a fiduciary for breach of fiduciary duty have traditionally been viewed as equitable. See *ibid.* (citing *Strom*, 202 F.3d at 144-145).

appeals that have considered an action for monetary relief against a breaching fiduciary under either Section 502(a)(2) or Section 502(a)(3) of ERISA have concluded that there is no right to a jury trial because the claims are equitable. See, *e.g.*, *Phelps* v. *C.T. Enters., Inc.*, 394 F.3d 213, 222 (4th Cir. 2005); *Borst* v. *Chevron Corp.*, 36 F.3d 1308, 1323-1324 (5th Cir. 1994), cert. denied, 514 U.S. 1066 (1995); accord *Broadnax Mills, Inc.* v. *Blue Cross & Blue Shield*, 876 F. Supp. 809, 816 (E.D. Va. 1995). The Second Circuit, however, has recently read this Court's decision in *Great-West* to require a jury trial in a non-ERISA case in which shareholders sought monetary losses from corporate fiduciaries accused of breaching their duties. See *Pereira* v. *Farace*, 413 F.3d 330, 339-341 (2005), cert. denied, 126 S. Ct. 2286 (2006). As the concurrence in *Pereira* pointed out, that conclusion is "at odds with centuries of equitable proceedings involving claims against trustees, estate executors, and other fiduciaries." *Id.* at 344 (Newman, J., concurring). Against the weight of that authority, but consistent with *Pereira*, district courts have begun to rely on *Great-West* to conclude that ERISA participants who seek to recover plan losses under ERISA Section 502(a)(2) from breaching fiduciaries are entitled to a jury trial because they are seeking "legal" rather than "equitable" relief. See, *e.g.*, *Bona* v. *Barasch*, No. 01 Civ. 2289, 2003 WL 1395932, at *35 (S.D.N.Y. Mar. 20, 2003). This Court's review of the Section 502(a)(3) issue would help correct the confusion that has spread to the jury trial issue in the lower courts.

In addition, the Section 502(a)(3) issue is of considerable importance in its own right. Numerous judges, including Justices of this Court, have recognized that the existing confusion about the scope of Section 502(a)(3), coupled with ERISA's expansive preemption provision, has created "an unjust and increasingly tangled ERISA regime." *Davila*, 542 U.S. at 222 (2004) (Ginsburg, J., joined by Breyer, J., concurring) (quot-

ing *DiFelice* v. *Aetna U.S. Healthcare*, 346 F.3d 442, 453 (3d Cir. 2003) (Becker, J. concurring)); see *Cicio* v. *Does 1-8*, 321 F.3d 83, 106 (2d Cir. 2003) (Calabresi, J., dissenting), vacated, 542 U.S. 933 (2004); *Tullis*, 464 F. Supp. 2d at 730. See also *Davila*, 542 U.S. at 221 n.7 (declining to address United States' argument concerning scope of Section 502(a)(3) because respondents had not pressed an ERISA claim). In those circuits that have precluded a surcharge remedy against ERISA fiduciaries, many plan participants and beneficiaries may be deprived of pecuniary redress from fiduciaries that have committed serious violations of ERISA's provisions and directly injured those they are charged with protecting. A wide range of injuries for which many courts previously granted monetary relief under Section 502(a)(3) are likely to go unredressed. See, *e.g.*, *Griggs* v. *E.I. DuPont de Nemours & Co.*, 237 F.3d 371, 385 (4th Cir. 2001) (allowing relief where employer erroneously informed participant that his lump sum early retirement payout would be tax deferred); *Strom*, 202 F.3d at 144 (authorizing recovery of life insurance proceeds that were lost because of fiduciary's negligent handling of insurance application); *McFadden* v. *R&R Engine & Mach. Co.*, 102 F. Supp. 2d 458, 471-475 (N.D. Ohio 2000) (permitting cancer patient to recover health expenses after he lost coverage because fiduciary failed to submit premiums to insurance company). The gap in redress for fiduciary breaches is even greater when the court of appeals' holding on the Section 502(a)(3) issue is combined with its holding that many participants in defined contribution plans also cannot recover for losses to their plans under Section 502(a)(2). And there may be benefits to the Court in addressing in a single case both avenues for relief that may be available to an individual in petitioner's position.

As this Court noted in *Russell*, "the crucible of congressional concern" that motivated enactment of ERISA "was misuse

and mismanagement of plan assets by plan administrators," and "ERISA was designed to prevent these abuses in the future." 473 U.S. at 141 n.8. Indeed, Congress stated in the statute itself that ERISA's goal is "to protect * * * the interests of participants in employee benefit plans * * * by establishing standards of conduct, responsibility, and obligation for fiduciaries of [those] plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. 1001(b). Given that explicit statement of purpose, it makes little sense that plans and their participants should be left with *no* relief when plan assets are lost through fiduciary mismanagement. The United States therefore urges the Court to grant review of both issues presented in order to clarify that ERISA provides monetary remedies to recompense plans and participants who have been harmed by fiduciary breaches.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

EDWIN S. KNEEDLER
Deputy Solicitor General

MATTHEW D. ROBERTS
Assistant to the Solicitor General

JONATHAN L. SNARE
Acting Solicitor of Labor

TIMOTHY D. HAUSER
Associate Solicitor

ELIZABETH HOPKINS
Acting Counsel for Appellate and Special Litigation
Department of Labor

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